Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1830

MARTIN HEISE,

Petitioner,

v.

VILLAGE OF PEWAUKEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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May 15, 1980

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PETITION FOR A WRIT OF CERTIORARI
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OF THE STATE OF WISCONSIN

The petitioner, Martin Heise, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin entered in this proceeding on November 6, 1979.

The opinion of the Supreme Court of Wisconsin, which appears in the Appendix hereto, p. A-38, infra, is reported at 92 Wis.2d 333 (1979), and is also reported in 285 N.W.2d 859.

An opinion of the County Court of Waukesha County dated December 27, 1976 is reprinted in the Appendix hereto, p. A-1, infra, and is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on November 6, 1979. A timely motion for reconsideration was entertained and denied on December 21, 1979. On March 6, 1980, Mr. Justice Stevens signed an order extending the time for filing this petition for certiorari to and including May 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether when presented with allegations by a party of facts calling in question the trial court's impartiality, due process of law requires the trial court to either refer the allegations to another judge for determination or to restrict review of the allegations to determining their legal sufficiency

without passing on the truth of the matters alleged and requires the judge to disqualify himself if the allegations are legally sufficient.

2. Whether in a non-jury action determining entitlement to land receipt by the trial court of information outside the record on the facts and the law to be applied to them without giving notice to the parties and a right to confront the person giving the information and advice and a right to be heard constitutes a denial of due process rights guaranteed by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourteenth Amendment, United States Constitution:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Wisconsin Statutes (1977), §757.19(2):

> Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: . . . (g) when a judge deter-

mines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Standard 3, Wisconsin Code of Judicial Ethics, 36 Wis.2d 252, 256:

3. A judge should be temperate, attentive, patient, industrious, and, above all, impartial. He should administer the law free of partiality and the appearance of partiality. To that end he should avoid membership in, or association with, an organization whose objectives, policies, or activities are incompatible with a fair and even handed administration of justice.

Standard 10, Wisconsin Code of Judicial Ethics, 36 Wis.2d 252, 258:

10. A judge should always bear in mind the need of scrupulous adherence to the rules of fair play. He should not permit private interviews, arguments, briefs or communications designed to influence his decision. He should not act upon ex parte applications unless the necessity for prompt action is clearly shown, granting relief only when fully satisfied that the law permits it

and the emergency requires it.

RAISING THE FEDERAL QUESTION

After trial of this matter, and after issuance of the trial court's opinion dated December 27, 1976, but before the approval of findings of fact and conclusions of law and entry of judgment, petitioner received information that the judge who presided at the non-jury trial, the Honorable Neal Nettesheim, had discussed petitioner's case with a Waukesha County Assistant District Attorney, Robert Daley, prior to issuing his opinion. Petitioner also learned that a witness in the trial, Michael Chapman, who had testified for petitioner, had been Judge Nettesheim's campaign manager and had learned that Mr. Chapman would directly benefit from a decision against Mr. Heise and in favor of the Village of Pewaukee because he owned property adjacent to the property in dispute. On January 31, 1977 petitioner telephoned Judge Nettesheim. Petitioner asked the Judge to have his decision put aside and the

case retried. He also asked that an impartial party handle his assertions concerning the matters heard without notice to the parties or their counsel. Petitioner raised with Judge Nettesheim the fact that no notice was given of the communications with Robert Daley and pointed out that Daley had been a tenant in a home near the property in question which was owned by a witness who testified for the Village and against petitioner at trial.

On February 22, 1977, a hearing in this case was held before Judge Nettesheim at which Judge Nettesheim placed on the record his recollection of the telephone conversation. Judge Nettesheim indicated that petitioner had requested the Judge to reopen the case and reevaluate its decision. Judge Nettesheim ruled that his decision would stand unless reversed by appeal. Judge Nettesheim did so after noting that petitioner's comments went directly to the integrity of the Court's decision in the case and after stating that petitioner's allegations were false or totally without merit.

Petitioner was represented by counsel before the Supreme Court of Wisconsin. Petitioner presented his arguments concerning his claim that he was denied a fair and impartial trial in oral argument to the Supreme Court of Wisconsin on October 8, 1979, pro se. Mr. Chief Justice Bruce Beilfuss questioned Mr. Heise concerning his position on whether it was proper for a trial judge to go outside of the record to help him make a decision. Heise responded that he supposed it was all right if the Judge notifies all parties in the suit which was not done in this case. In his conclusion in his reply brief to the Wisconsin Supreme Court, petitioner Heise stated:

> The trial court's decision was inconsistent with the evidence and the conduct of the Honorable Neal Nettesheim during and after the trial was more than suspect as being bias (sic) against the plaintiff-appellant.

Neither of the opinions written in this case reflect consideration by the trial court or the Supreme Court of the questions raised by this petition.

Judge Nettesheim's opinion was released prior to petitioner's obtaining knowledge of the facts supporting his contentions questioning the impartiality of Judge Nettesheim's decision. The Supreme Court of Wisconsin in its decision chose to ignore petitioner's assertions of denial of his right to a fair and impartial trial. Neither Judge Nettesheim nor the Supreme Court of Wisconsin has raised any question as to whether or not petitioner's request for a new trial or reconsideration in light of his assertions of facts demonstrating lack of impartiality were properly asserted. Petitioner raised the matters with the trial court promptly upon their discovery and personally argued them to the State Supreme Court.

This case is proper for consideration by the United States Supreme Court despite the failure of the State Supreme Court to rule on petitioner's claims of denial of due process of law. This Court has recognized that it may properly review constitutional issues even where they have been ignored by the appellate courts if they were raised in the trial

court and substantial efforts were made to raise them with the appellate court as well. Chambers v. Mississippi, 410 U.S. 284, 289 fn. 3, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In this case the Supreme Court affirmed a judgment which determined that petitioner Heise did not have title to the property in question and foreclosed a number of defenses to the charge of obstruction of a village street. Although the Supreme Court of Wisconsin did not expressly mention the due process issues, the Supreme Court's affirmance necessarily decided those issues against petitioner's claims. Furthermore, Heise's claim was brought to the attention of the State Court with fair precision and in due time. Street v. New York, 394 U.S. 576, 581-584, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

STATEMENT OF THE CASE

In the summer of 1976 petitioner, Martin Heise, began construction of a garage and patio adjacent to his house on the shores of Pewaukee Lake by pouring a concrete garage slab and patio

slab. The Village of Pewaukee, respondent herein, claimed the slab was partially on property to which it had title because it was an extension of Lake Street between Park Avenue and the shores of Lake Pewaukee. The city charged petitioner under a local ordinance for obstructing a Village street. Petitioner brought an action to quiet title against the Village, claiming title through a quitclaim deed from the heirs of those who owned the land in dispute prior to its transfer to the Village or its dedication as a street. Petitioner also claimed that if the land was properly dedicated or transferred to the Village, a reversionary clause and a deed of the property to the Village had taken effect. That reversionary clause in an 1896 deed provided in relevant part as follows:

> Said piece to be accepted, kept, used and maintained by any grantee as and for a public street or highway approach to said lake and for no other purpose, and in case of the discontinuance of such use and maintenance, said piece shall revert to said grantors, theirs (sic) or assigns.

Both the ordinance violation matter and the quiet title action were tried to the Court before the Honorable Neal Nettesheim of the County Court of Waukesha County. Subsequent to trial Judge Nettesheim issued an opinion on December 27, 1976. (App. p. 1, et seq.) The Court concluded that the area in question was and remains dedicated to the Village of Pewaukee by petitioner's predecessors in title and that the Village's claims to the disputed area of Lake Street is superior to that of petitioner's.

Petitioner learned that Judge Nettesheim discussed petitioner's case with an assistant district attorney, Robert Daley, in his chambers prior to rendering his opinion. Petitioner also learned that Mr. Daley had been a tenant in a home in the immediate vicinity of the land in question. He also learned that that home was owned by a Mr. White. Mr. White had testified as a witness for the Village in the trial of this matter. Petitioner also learned that a witness in the proceeding, Michael Chapman, had served as campaign manager for the Judge

in a judicial election. This relationship between Judge Nettesheim and the witness had not been disclosed. Petitioner also learned that Mr. Chapman had an interest in the outcome of the action because his property was adjacent to the land in dispute and would directly benefit from a decision that the property belonged to the Village. Petitioner also received information that Judge Nettesheim had been out on the property between the time of trial and the time of his decision. Petitioner later determined that the contention that the Judge viewed the property without notice to the parties was without foundation. Petitioner has not pursued the allegation that the Judge viewed the property and does not pursue that matter in this Court.

On January 31, 1977 petitioner telephoned Judge Nettesheim and discussed the three matters outlined above with him. He told Judge Nettesheim that he had confirmed with Mr. Daley that Mr. Daley had discussed petitioner's case with Judge Nettesheim in Judge Nettesheim's chambers. Judge Nettesheim in-

quired if petitioner was telling him that the Court had gone outside the record to get information. Mr. Heise confirmed that that was what he was told. Judge Nettesheim confirmed that Mr. Daley had told him that Mr. Daley lived right across the street or a block away up until a year ago and that he was familiar with the place. Petitioner also expressed his concern that Mr. Chapman, who had been a witness in petitioner's case, had been the Judge's campaign manager. Judge Nettesheim indicated that he would hold a hearing on these matters and would order in any person who had supplied information to petitioner or he would order petitioner at such a hearing to disclose who the people were at such a hearing. Mr. Heise indicated to the Judge that he understood that the people who had talked to him were afraid for their particular jobs and he told the Judge that maybe he should go to somebody else so that he could have a hearing on these matters. Judge Nettesheim made no response to petitioner's expressed understanding that the people who had told him of these matters were afraid for their jobs.

Judge Nettesheim claimed that he did not turn to anybody to help him make his decisions except the lawyers. Judge Nettesheim also denied ever being at the site in question. Judge Nettesheim cautioned petitioner very strongly to check the accuracy of information. The Judge urged petitioner to put his complaints on the record. Petitioner indicated that he would like to have the decision put aside and retried if his complaints were in fact the case. Petitioner also indicated to the Judge that if the Judge was going to tie in the other people and those people would be afraid of losing their jobs if they did come up with the information supplied to petitioner and testified to this, that he would rather have an impartial party handling this. Judge Nettesheim did not indicate that he would refer the matter to another decider.

Subsequent to the January 31 conversation, Judge Nettesheim convened a hearing on February 22, 1977. The transcript of that proceeding is found in the appendix to this petition at p. A-31. At that hearing petitioner's

attorney, Mr. Ratzel, indicated to the Court that he was in Florida at the time of petitioner's telephone call to the Judge and that he did not intend to participate in or make any statements with regard to petitioner's assertions. Thus petitioner was unrepresented by counsel with regard to these matters at the time of the February 22, 1977 hearing. Mr. Heise declined to make a record concerning his assertions at that time. The Court set forth his recollection of the telephone conversation in any event. He described petitioner's allegations as one that "the decision rendered by the Court in this case had been either written by another or that the Court had received added information beyond the record in this case apparently in the form of amicus curiae information. . . from other sources and other lawyers." The Court stated "That statement is false." (App. p. A-34)

The Court stated that petitioner indicated "the decision in this case ran to the financial inurement and benefit of Mr. Michael Chapman, who was a witness in the case, and that since Mr.

Chapman had been associated with a political campaign of this Court that therefore the decision and the integrity of the decision of the Court was suspect." Judge Nettesheim went on:

> I would only observe, firstly, that Mr. Chapman was Mr. Heise's witness, not the Village's witness; that Mr. Chapman was a paid, and I might observe well paid, campaign advertising person in the campaign of this Court, and the suggestion and inference drawn by Mr. Heise under the circumstances of this case is totally without merit. (App. p. A-35).

The Court also stated that petitioner indicated that the Court had been on the premises on one or perhaps more occasions during the pendency of this action and apparently while preparing and rendering its decision. The Court indicated that this statement was equally false as the others. (App. p. A-35).

The Court also indicated that petitioner requested that "if in the light of those remarks this Court would not be inclined to perhaps reopen or apparently reevaluate its decision." (App. p. A-36). The Court went on to state:

> Well, that is nothing short, in my judgment, Mr. Heise, of judicial blackmail, and I assure you this decision stands and will continue to stand unless reversed by appeal, which is your absolute right under the law, and Mr. Ratzel is apparently taking steps to see that that right is protected, but the fact that these allegations had been made, the fact that apparently the defendant, Mr. Heise, would presume that this Court would do nothing about them is a situation which this Court simply could not permit to endure, and even though the defendant has chosen not to make the record here today the Court feels compelled in this respect to make a record.

On April 20, 1977 Judge Nettesheim entered judgment against petitioner and petitioner appealed to the Supreme Court of Wisconsin.

As a result of Judge Nettesheim's decision and its affirmance by the State Supreme Court, petitioner has been deprived of title and ownership of the

disputed parcel of land and has been found in violation of the Village ordinance prohibiting obstructing a Village street. Proceedings regarding removal of the obstruction are pending.

REASONS FOR GRANTING THE WRIT

This case presents the question of what procedure is constitutionally required for presenting and resolving allegations by a litigant of facts inferring lack of impartiality of the trial judge in a case tried to the Court. Under what circumstances, if any, does due process require that the facts asserted, the inferences drawn therefrom, or the consequences for further action in a lawsuit should be decided by someone other than the Judge whose conduct is called in question? What is the proper scope of the role of the Judge whose impartiality is questioned in determining any or all of these issues? These questions are significant and recurring problems which are common to almost all types of litigation, both criminal and civil, entertained by both state and federal courts.

Petitioner contends that when presented with facts bearing on the trial court's impartiality, Judge Nettesheim both refused to refer the matter to another judge or other impartial decider for determination of the truth or falsity of the allegations and conducted a proceeding at which he found the factual assertions of petitioner to be false. The trial judge did not restrict his role to a determination of the legal sufficiency of the allegations and then disqualified himself if they were determined to be sufficient. In fact he did not expressly determine the legal sufficiency of the allegations at all. He denied the allegations and then found they were false. He then denied petitioner's request for reconsideration or a new trial.

In the context of interpretation of the Federal Statutes providing for the filing of affidavits of bias and prejudice in Federal Court proceedings, this Court has ruled that once the motion is filed seeking removal of the judge, the judge must pass on the legal sufficiency of the affidavit, but may

not pass on the truth of the matters alleged. See Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). The Court stated in relevant part:

> But we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial, -- free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Berger v. United States, supra, p. 35-36.

The Court went on to explain:

> To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there

> fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. Berger, supra, p. 36.

It is the view of petitioner that the result reached in Berger restricting the role of the Court in considering allegations of bias and prejudice directed personally at the Court, constitutes an attempt to avoid the necessity for requiring determination of the allegations by someone other than the trial judge himself and is an attempt to assure due process of law without the inconvenience of referring the matter to another judge.

The lower federal courts have apparently experienced some difficulty in interpreting and applying the Berger rule. See especially the specially concurring opinion of Circuit Judge Gee in Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 105 (1975). Circuit Judge Gee expresses his doubt that Berger v. United States, supra, remains good law. He describes Berger as representing "an outdated rule

which has been made tolerable in present circumstances only by engraftment of dubious exceptions."

Petitioner refers to Circuit Judge Gee's opinion not because petitioner agrees with his analysis nor the direction in which his analysis would lead. His opinion is referred to because it illustrates the diversity of interpretation of various courts and the generally unsettled nature of the law in this area. Circuit Judge Gee identifies only three workable modes of deciding the issue of bias or prejudice: "(1) peremptory disqualification upon the mere filing of an affidavit; (2) decision of the issue by another magistrate than the one accused; or (3) decision either of actual bias or the reasonable appearance of it by the magistrate sought to be disqualified." Ibid. at p. 106. Petitioner would urge this Court to require that assertions of facts which reasonably call in question the impartiality of the judge, at least where the allegations are of conduct of the judge himself, rather than merely assertions of appearances of conflicts arising from

past relationships with parties, witnesses or other participants in the process of litigation should be decided by another magistrate than the one accused. In any event the petitioner requests the Court to consider as a minimal requirement on State Court judges adherence to the limitations in Berger v. United States, the determination by the judge of the legal sufficiency of the allegations rather than the truth or falsity of the factual assertions themselves. It should be noted that the allegations in this case meet the concern raised in United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), that the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." In this case petitioner's allegations are that the trial judge went outside the record to obtain information without giving notice to the parties, an opportunity to confront and cross-examine the person giving the information, and without an opportunity to be heard re-

garding the factual information and legal positions communicated. Similarly, the prior business and campaign relationship between the Judge and the witness constitutes an extrajudicial source within the meaning of the language quoted from United States v. Grinnell Corp.

This Court has long recognized the importance and significance of an assurance of an impartial judge to securing the guarantee to due process of law provided for in the Fourteenth Amendment. See especially, Ward v. Monroeville, 409 U.S. 57, 334 L.Ed.2d 267, 93 S.Ct. 80 (1972), reaffirming the holding of Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243 (1927). Ward v. Monroeville, supra, like this case, was a local ordinance violation action. In that case the Court found that the fact that the revenue produced from the Mayor's Court provides a substantial portion of a municipality's funds from which the Mayor's salary was paid, presented facts establishing a violation of the Fourteenth Amendment and its due process provisions.

This Court has also recently reaffirmed the teaching of In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that "a fair trial in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975). The Court in Withrow stated: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' (Citation omitted)." Id. at p. 47.

The procedure followed by the trial court did not expressly address the question of the legal sufficiency of petitioner's allegations. This Court has recognized, however, the constitutional significance of consideration of information outside the record. This Court stated:

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that

> forecloses an opportunity to offer a contrary presentation. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); United States v. Abilene & S.R. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016 (1924). Bowman Trans. v. Arkansas-Best Freight, 419 U.S. 281, 289 fn.4, 95S.Ct. 438, 42 L.Ed.2d 447 (1974).

Wisconsin law recognizes the importance of avoiding ex parte communications designed to influence a judge's decision. Standard 10 of the Wisconsin Code of Judicial Ethics provides as follows:

> 10. A judge should always bear in mind the need of scrupulous adherence to the rules of fair play. He should not permit private interviews, arguments, briefs or communications designed to influence his decision. He should not act upon ex parte applications unless the necessity for prompt action is clearly shown, granting relief only

> when fully satisfied that the law permits it and the emergency requires it. 36 Wis.2d 252, 258, 153 N.W.2d 873 (1967).

The Wisconsin Supreme Court has stated:

> It will often happen that a judge, particularly where he resides in the same community with the parties, will have some awareness of the backround of the dispute which comes into his court but his decision must always be based solely on the facts brought out before him during the course of the proceeding. Unless he is certain that he can put aside such information as may have come to him outside the record and such opinions as he may have formed thereon he must disqualify himself. Ausman v. Ausman, 31 Wis.2d 79, 86 (1965).

The Wisconsin legislature has recently revised the law on disqualification of judges. The law which became effective August 1, 1978 makes clear that a judge should disqualify himself when it appears he or she cannot act in an impartial manner. Section 757.19 of

the Wisconsin Statutes reads in relevant part:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: . . .
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

The predecessor section of the Wisconsin Statutes was not as explicit. Section 256.19 stated in relevant part:

> In case any judge of any court of record shall be interested in any action or proceeding in such court . . . such judge shall not have power to hear and determine such action or proceeding or to make any order therein, except with the consent of the parties thereto.

The Wisconsin legislature has now made it clear that in cases where a judge determines that it appears he cannot act in an impartial manner, not just in cases where he determines he cannot act in an impartial manner, he should disqualify himself.

Unfortunately the Wisconsin Supreme Court has not in its statutes or opinions set forth the process by which determinations of disqualification are to be made.

In any event this Court has ruled that due process of law requires that a judge not sit on a case where an appearance of bias requires his disqualification. This Court has stated:

> But contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot "hold the balance nice, clear, and true between the state and the accused. . ." Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Taylor v. Hayes, 418 U.S. 488, 501, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

In this case the procedure of requiring petitioner to present his allegations to the trial judge, and the trial judge's decision to respond to and rule on those allegations himself, both with regard to their factual basis and the legal and actual implications for his impartiality in reaching his decision, may have contributed to the creation of a situation where the trial judge could not longer hold the balance between the interests of the Court and the interests of petitioner. See, for example, the Judge's response to petitioner's request for reopening or reevaluating its decision in light of petitioner's allegations quoted at page 17 above.

The trial court's description of Mr. Heise's raising of factual allegations as constituting judicial blackmail seriously questions the capacity of the Judge to hold the balance, nice, clear and true between his interests and the interests of petitioner.

Unfortunately the Wisconsin Supreme Court has not since 1853 discussed the problems presented when allegations are made of bias or prejudice and those allegations are to be considered in the course of a lawsuit. The Wisconsin Supreme Court in Hungerford v. Cushing, 2 Wis. 292 (1853), considered the problems presented for a judge when allegations of bias are presented to him. In that case the position was advanced that the judge when presented with affidavits in support of a motion to disqualify for prejudice, should decide the question of the condition of his own mind and feelings by extrinsic testimony, regardless of the actual condition of his mind and feelings as determined by his own consciousness. The Court distinguished the Wisconsin statute in effect at that time from statutes used in other cases on the

basis that in those cases the judge had no discretion when the affidavit was made and was in conformance with the statute. The Court determined that the Wisconsin judge had discretion to decide the factual validity of the allegations in the affidavits. This, however, was dicta because it held that in any event the issue was not appealable. The Court stated in its opinion:

> A scene cannot well be imagined, which would be more disgraceful to a court, or better calculated to bring contempt and ridicule upon it, than a trial of such a question, conducted upon the principles contended for by the appellants. If the testimony contained in the affidavits of the parties is to prevail, regardless of the actual findings of the judge, his private and social relations, his friendships, his animosities, real or supposed, expressions which he may have made heedlessly in relation to the parties, or some one of them, his private conversation, and the interests of his friends, all would be made the subjects of judicial investigation before himself, and any opinion

> which he might form upon such testimony, would be subject to review in this court. Id. at 298-299.

It is the contention of petitioner, however, that the difficulties presented from attempting to restrict the role of the Judge to consideration of extrinsic facts and the reasonable inferences which can be drawn from them with regard to lack of impartiality or bias, can best be avoided, not by insulating the trial court from any review of its determinations, but by setting forth situations where the issue should be determined by someone other than the judge who is alleged to have engaged in improper conduct or to be biased or prejudiced.

Taken together, this Court's decisions regarding the importance of assurance of an impartial decider as an aspect of due process of law mandate consideration by this Court of the constitutional adequacy of the procedures engaged in by the Wisconsin courts to assure a fair trial. Petitioner was determined to not be entitled to property in his view after receipt by the trial court of information outside the record both

on the facts and on the law to be applied to them without giving petitioner notice or the right to confront the person giving such information and advice or the right to be heard in response to such assertions. If petitioner is correct in his contention then his due process rights guaranteed by the Fourteenth Amendment were violated. In any event the procedure followed to determine this matter was defective and in violation of the Fourteenth Amendment itself.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Wisconsin.

Respectfully submitted,

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May 15, 1980

APPENDIX

The order of the Supreme Court of Wisconsin denying petitioner's motion for reconsideration follows:

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, December 21, 1979

TO: August E. Fabyan, Jr.
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Hartland, WI 53029

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735 No. Water St., Suite 928
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The Court today announced an order in your case as follows:

MARTIN HEISE v. VILLAGE OF PEWAUKEE, #76-749.

Motion for Reconsideration denied without costs.

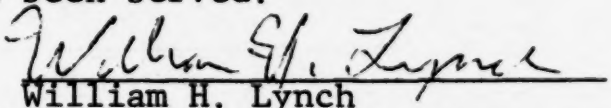
C. J. Beilfuss took no part.

MARILYN L. GRAVES
Clerk of Supreme Court

The opinion of the trial court, the transcript of proceedings in this matter on February 22, 1977, before the trial court, and the opinion of the Supreme Court of Wisconsin are contained in the continuation of this appendix which has been separately bound in accordance with the provisions of Rule 23(f) and (i) of the United States Supreme Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of May, 1980, three copies of the petition for writ of certiorari were mailed, postage prepaid, to Mr. Timothy P. Garrity, Attorney at Law, 2505 No. Mayfair Road, Milwaukee, Wisconsin 53226, counsel for the respondent. I further certify that all parties required to be served have been served.



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Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1830

MARTIN HEISE,

Petitioner,

v.

VILLAGE OF PEWAUKEE,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. LYNCH
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Counsel for Petitioner

May 15, 1980

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Decision
Dated December 27, 1976
(Formal Parts Omitted)

INTRODUCTION

County Court Case No. 76-958, entitled Village of Pewaukee v. Martin Heise, is an action for civil forfeiture under Section 10.05(11) of the Village Code charging the defendant with the offense of obstruction of a village street.

Circuit Court Case No. 37178, entitled Martin Heise v. Village of Pewaukee, is an action to quiet title in the plaintiff to the same premises alleged to be a village street in the County Court case.

Since the legal and factual issues in both cases appear to be identical, the parties, pursuant to written stipulation, agreed that both matters should be consolidated in the County Court for purposes of trial. Pursuant to that stipulation the Circuit Court case was ordered transferred to County Court.

For purposes of this decision the Village of Pewaukee will be referred to

as the plaintiff, and Martin Heise will be referred to as the defendant.

FACTS

The essential facts in this case are not in dispute. These facts, and the history of this case, is best told by reference to certain of the exhibits.

On August 3, 1887 there was recorded in the Office of the Register of Deeds for Waukesha County, Wisconsin the Plat of Lakeview Addition to the Village of Pewaukee (Exhibit 1).

This plat shows in its upper and northwestern reaches the intersection of Oakton Avenue and Lake Street terminating at the meander line of Pewaukee Lake. This plat also shows an area of shore line, generally south of Lake Street, between the northwesterly edge of Oakton Avenue and the meander line of Pewaukee Lake. This shore line is indicated on the plat to be "16 feet wide".

Subsequent thereto on October 14, 1896 Walter C. Clark, his wife, May, Ola M. Anderson and Helen N. Richmond executed a warranty deed to the Village of Pewaukee. This deed is referred to

in Exhibit 7, which is a photocopy of an abstract entry. The property conveyed in this deed represents an extension of Lake Street beyond its termination point as shown in the Plat of Lakeview Addition (Exhibit 1) northwesterly into the waters of Pewaukee Lake. This area conveyed in Exhibit 7 was apparently created sometime between the date of the initial Plat of Lakeview Addition in 1887 and the date of the deed (Exhibit 7) in 1896. The record in this case does not show how this new land was created - whether by accretion, reliction or some process of reclamation.

This deed (Exhibit 7) contained the following language:

> ". . .Intending hereby to convey a piece of land Sixty (60) feet wide and extending from Oakton Avenue to the low water mark of Pewaukee Lake and to be an extension and continuation of Lake Street as the said street is laid out and designated on the Plat of Lakeview Addition to Pewaukee. Said piece to be accepted, kept, used and maintained by said grantee as and for a public street or highway approach to said lake and for no other purpose,

> and in case of the discontinuance of such use and maintenance, said piece shall revert to said grantors, theirs or assigns."

On June 15, 1908, according to the certified copy of the minutes of the Village Board, as shown in Exhibit 17, a plat of the "Lakeshore in Lakeview Addition" was presented for acceptance but was returned for correction "so as to show that part of Lake Street between Oakton Avenue and the Lake to be Sixty (60) feet in width".

On August 1, 1908 the Plat of Clark's Subdivision (Exhibit 2) was accepted by the Village Board of Pewaukee and duly recorded. The survey of this plat was made in June of 1908. This map plats the newly created land not in existence when the earlier Plat of Lakeview Addition was recorded. An examination of this plat reveals that the original 16 feet of shoreline as shown in the Plat of Lakeview Addition contains Lots 1 through 14 bordering on Pewaukee Lake varying in depth from 72 feet with respect to Lot 1, increasing and decreasing variously to 50 feet on the southwesterly side of Lot 11.

The disputed portion of land involved in this litigation is that area conveyed by the warranty deed of 1896 (Exhibit 7). It is also shown on the Plat of Clark's Subdivision (Exhibit 2) in the northern reaches and is that portion of Lake Street extended generally northward of the intersection with Oakton Avenue to the waters of Pewaukee Lake.

The Plat of Clark's Subdivision shows the letters "A" thru "D", representing the exterior boundaries of the plat, pursuant to the legal description as set forth in the certificate of the surveyor. These letters were marked upon this exhibit by the witness, Hauser, at the time of trial and during his testimony. It should be noted that these exterior boundaries, as governed by the legal description, do not include the disputed area, namely the extension of Lake Street northerly to Pewaukee Lake.

The defendant is the owner of Lots 1 and 2 as shown in the Plat of Clark's Subdivision. The defendant's ownership of these two lots is documented by the warranty deeds marked Exhibits 4 and 5.

Ownership of these lots is not at issue in these two cases.

The defendant's claim of ownership to the disputed portion of Lake Street is based upon Exhibits 8, 9, 10 and 6. Exhibits 8, 9 and 10 are photocopies of the probate proceedings of the Estates of Walter C. Clark, Ola M. Anderson and Helen Richmond, respectively. None of the Final Judgments set forth in these exhibits specifically refers to the disputed portion of Lake Street. All of these Judgments, after awarding specific real estate owned by the various decedents, then recite the usual residuary language assigning the specified real estate "and any other real estate, if any there be" to the appropriate legates.

Helen R. Jerome inherited all real estate from Helen N. Richmond, the last of the above named to die. Exhibit 6 is a quit-claim deed from Helen R. Jerome to the defendant, Martin Heise, conveying the disputed portion of Lake Street to the defendant. This deed is dated April 15, 1976.

Prior to the defendant obtaining the Jerome deed (Exhibit 6) the defen-

dant petitioned the Village Board of the Village of Pewaukee to vacate the disputed portion of Lake Street. The Planning Commission meeting of November 13, 1975, as shown at Item G of the minutes as set forth in Exhibit 11, resulted in a denial of this application. This was followed by an action of the Village Board on November 17, 1975 also denying the defendant's application for vacation of the disputed portion of Lake Street. This action of the Village Board is also shown in Exhibit 11. It is undisputed that the defendant arranged for the construction of a garage slab and patio slab of which a portion of each extends and encroaches onto and over the disputed area of Lake Street. This encroachment is shown by the gray, shaded area in the Plat of Survey (Exhibit 3) prepared by the witness, Hauser. These installations were made in June or July of 1976.

ISSUES

The Village contends that a dedication occurred by virtue of the Plat of Lakeview Addition (Exhibit 1), the 1896 deed to the Village (Exhibit 7), or by

the Plat of Clark's Subdivision (Exhibit 2).

The defendant contends that the only dedication that could have occurred was by means of the 1896 deed (Exhibit 7) but that a reversion to the defendant has occurred by virtue of the Village's failure to accept, use and maintain the property.

I

PLAT OF LAKEVIEW ADDITION

The Plat of Lakeview Addition (Exhibit 1) in and of itself cannot and did not dedicate then submerged lands to the Village of Pewaukee. This is not the rule of the case of Village of Pewaukee v. Savoy, 103 Wis. 271, where the right of the public to submerged lands created by artificial raising of the lake was upheld over the attempt of the previous owner to reclaim the lands and to exclude the public therefrom.

A

PLAT OF LAKEVIEW ADDITION AS AFFECTED BY THE PROCESSES OF ACCRETION, RELICTION & RECLAMATION

The Plat of Lakeview Addition (Exhibit 1) clearly shows Lake Street as it then existed terminating at the waters of Pewaukee Lake. The exterior boundaries of the plat, pursuant to the calls or bearings of the survey, include all of Lake Street as platted. The recording of this plat constituted a dedication of Lake Street to the Village of Pewaukee. This is not disputed by the parties.

The next consideration, then, is the legal affect, if any, of the creation and appearance of the added lands on the shores of Pewaukee Lake not in existence at the time of the Plat of Lakeview Addition (Exhibit 1) and subsequently platted in the Plat of Clark's Subdivision (Exhibit 2) and a portion of which was conveyed in the 1896 deed (Exhibit 7).

As previously noted, there was no evidence presented on the trial of these cases as to whether the creation and appearance of these new lands was due to accretion, reliction or reclamation.

Accretion and reliction are terms

sometimes used interchangeably. More precisely, however, accretion refers to the process of the gradual and imperceptible addition to riparian lands made by the water to which the land is contiguous. Reliction is used to define that land created by the gradual retrogression of the waters thereby laying bare previously submerged lands. Reclamation is used to define that process whereby added riparian lands are created by some man made process.

It is more likely that some process of reclamation created the new and added lands platted in the Plat of Clark's Subdivision (Exhibit 2). This is because the natural processes of accretion or reliction might be expected to consume a greater period than nine years (the period of time between the recording of the original Plat of Lakeview Addition (Exhibit 1) and the recording of the 1896 deed (Exhibit 7)). However, specific findings cannot be made on the basis of the record in this case.

It has been held that when shore lands are subject to an easement for

street purposes, the easement will also attach to accretion or relictions apportioned thereto (Hathaway v. Milwaukee, (1907) 111 N.W. 570, 132 Wis. 249; Jansky v. Two Rivers, (1938) 278 N.W. 527, 227 Wis. 228).

While it is not as clear that full incidents of ownership accrue to private riparian owners with respect to reclaimed lands, it has been held with respect to existing highways and streets reaching an existing water mark before reclamation that the easement continues over the newly added area filled in at the end of the existing highway (Attorney General v. N.J. Cent. R.R. Co., 68 N.J. Eq. 198, 59 Atl. 348; City of Elizabeth v. N.J. Cent. R.R. Co., 70 N.J. Eq. 797, 66 Atl. 418; Horgan v. Jamestown, 80 Atl. 271, 32 R.I. 528; Moore v. Kuljis, 207 So.2d 604 (Miss.); State v. Reybold, 5 Del. 484; Seabright v. Allgor, 56 Atl. 287; Albee v. Town of Yarrow Point, 74 Wash.2d 453, 445 Pac.2d 340).

And while the Village of Pewaukee v. Savoy, supra, is distinguishable on its face, certain language from the

decision sets forth the public policy considerations which are pertinent:

> "It follows from the foregoing that the public right to the bed of Pewaukee Lake, within the limits affected by the judgment appealed from, reaches to the line of the street; and it necessarily follows that the defendants have no right, by reason of a qualified title to the street on the side toward the lake, if they have such qualified title, to claim riparian rights as an incident thereto. In such situations the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water."

The public policy considerations in support of these decisions are considerable and obvious. The existence of a street at the original waterline obviously serves as access to the public for its enjoyment and recreation. It further serves as access to the municipality for purposes of assisting in the rendering of municipal services. These recreational, commercial and governmental

interests in maintaining such access are compelling. To prohibit the right of the public and its governmental units to the continued use of such access when logical extensions of it are created by nature or man would result in substantial public inconvenience. In certain circumstances complete access to a body of water could be cut off. Logical areas of access to bodies of water would be rendered inaccessible. Intelligent future planning of streets and highways terminating at existing meander lines of bodies of water would be placed in an uncertain state. Illogical and absurd terminations of streets would occur. Areas not necessarily best suited for access would be pressed into service for that purpose.

Therefore, the Court concludes that the Village of Pewaukee received title to Lake Street as originally dedicated in the Plat of Lakeview Addition (Exhibit 1) and that such dedication extended to and over the added lands forming the extension of Lake Street as drawn on Exhibit 2, whether such process of creation was by accretion, reliction

or reclamation.

There remains the question of whether apportionment of the accretion, reliction or reclamation is necessary. Numerous cases have dealt with this question for relief. Here, however, the apportionment of the new lands has already been answered by the parties and their predecessors in title. The platters of Clark's Subdivision (Exhibit 2) in effect proposed an apportionment of the newly created lands which was accepted by the Village. In addition, Exhibit 7, the deed conveying the extension of Lake Street, represents an earlier and added affirmation of the original owners and the Village as to the manner in which this newly created land was to be apportioned. Consequently, there is no judicial apportionment asked and, indeed, none is necessary.

Numerous cases have dealt with the proper manner of apportionment and have developed a series of rules and guidelines to be applied when apportionment is necessary. The consideration and application of such rules is not appropriate here when the original owners

and the Village have already by dedication by deed (Exhibit 7) and dedication by plat (Exhibit 2) resolved the matter.

II
DEDICATION BY DEED

There is no dispute between the parties that the 1896 deed (Exhibit 7) represents an express dedication of the disputed area of Lake Street. This is obvious from the face of the document, and the Court finds that an express dedication was accomplished by the execution, delivery and recording of this document.

The question remains as to whether a reversion has occurred under the language of this document, and this will be discussed later in Part IV of this decision.

III
PLAT OF CLARK'S SUBDIVISION

The Village contends that the Plat of Clark's Subdivision (Exhibit 2) constitutes a statutory dedication of the disputed portion of Lake Street. An examination of that plat reveals that

the disputed portion of Lake Street is shown in the upper reaches of the plat. However, it is equally clear that the bearings and calls of the legal description as defined by the letters "A" thru "H" on the exhibit do not include the disputed portion of Lake Street.

Section 26.61 of the Wisconsin Statutes, a portion of the governing law at the time of the presentation and acceptance of the Plat of Clark's Subdivision (Exhibit 2) required that in order for a plat to be entitled to recordation it must contain:

> (2) On the face or back of every such map offered for record shall appear and be written the certificate of the surveyor who surveyed and mapped the land, which certificate shall contain:
>
> (1) A clear and concise description of the land so surveyed by legal government subdivisions when practicable . . .
>
> (2) By whose order and direction he made the survey map.
>
> (3) That the map is a cor-

rect representation of all the exterior boundaries of the lands surveyed and of the divisions thereon made.

It is obvious from the testimony of the witness, Hauser, as he charted the exterior boundaries from the surveyor's certificate of Clark's Subdivision (Exhibit 2) that the extension of Lake Street was not surveyed and is not included within the exterior boundaries of the lands surveyed. While it is true that the intent of the parties to any document of conveyance is to be garnered from all of the attendant circumstances and from the data on the plat itself, when the language of the legal description specifically sets forth the property surveyed and platted, no ambiguity exists and a resort to extraneous or parol material is improper. This is a fundamental rule of construction of conveyances and it must be applied in this case.

The Village apparently contends that since the minutes of the Village Board meeting of June 15, 1908 (Exhibit 17) indicate a motion to return "a plat of

the Lake Shore in LAKEVIEW ADDITION" for the purpose of correction so as to show Lake Street between Oakton Avenue and the lake to be 60 feet in width, this suffices to constitute a dedication of the disputed portion of Lake Street as shown on the Plat of Clark's Subdivision (Exhibit 2). It should first be noted that the minutes in Exhibit 17 refer to "a plat of the Lake Shore in LAKEVIEW ADDITION", whereas the plat ultimately accepted by the Village Board in August, 1908 is entitled Plat of Clark's Subdivision (Exhibit 2). Even if the plat referred to in the minutes and the Plat of Clark's Subdivision are one and the same, the Court is nonetheless of the opinion that the certificate of the surveyor reciting the bearings of the plat control as to what was platted and what was not platted.

This conclusion is supported by the fact that the Lake Street extension had previously been dedicated by the 1896 deed referred to in Exhibit 7. It has been held that where a strip of land had been conveyed to a city by quitclaim deed for use as a public alley, it was

unnecessary that a subsequent subdivision of an adjacent property dedicate such strip for the alley (Williams v. Larson, (1952) 53 N.W.2d 625, 261 Wis. 629).

Therefore, the Court concludes that the Plat of Clark's Subdivision (Exhibit 2) does not in and of itself and standing alone dedicate the disputed portion of Lake Street to the Village of Pewaukee.

IV
IMPLIED DEDICATION OR COMMON LAW DEDICATION

Common law dedication requires an intention to dedicate expressed in some form and acceptance of the dedication by the proper public authorities, or by general public user (Hunt v. Oakwood Hills Civic Association, (1962) 19 Wis. 2d 113, 119 N.W.2d 466; Knox v. Roehl, (1913) 153 Wis. 239, 140 N.W. 1121).

In the instant case there is little problem in finding the intent of the original owners of the disputed area of Lake Street to dedicate the same to the Village of Pewaukee. Standing alone, either the 1896 deed (Exhibit 7) or the Plat of Clark's Subdivision (Exhibit 2)

together with the request by the Village for correction of a plat to show the extension of Lake Street to be 60 feet (Exhibit 17), would reflect such intention. Considered together, the two episodes show an unquestioned intent to dedicate.

On the questions of acceptance of the dedication by the Village or by the public, the witness, William Brown, presented the most complete testimony.

Mr. Brown's recollections of the disputed area of Lake Street in question commence from the year 1927 to the present time. This testimony showed that this disputed area of Lake Street has been used by the public for purposes of access to Pewaukee Lake on a regular basis at least since 1927.

This area has been used by the public to drive onto the ice of Pewaukee Lake on a regular seasonal basis. The public has used the area for purposes of access to the ice and to the water for purposes of obtaining water, seaweed and driftwood. As recently as one week prior to trial Mr. Brown had driven onto the area for purposes of getting to the lake.

Mr. Brown had used the area for purposes of access to the ice of Pewaukee Lake during the winter of 1974-75. On one occasion Mr. Brown assisted the defendant in launching the defendant's houseboat from this area. The witness described this area as the chief access to Pewaukee Lake for many years.

Mr. Charles White, another resident from the area, testified that his acquaintance with the disputed area begins from approximately 1950 to the present. This witness indicated that he himself has used the area on various occasions for purposes of access to the lake ice and waters of Pewaukee Lake. Mr. White also testified that for some period of time citizens of the Village would use the area for purposes of installing and removing a pier on a seasonal basis at the foot of the disputed area of Lake Street. This witness testified that he had launched a boat from this area in 1973 and is aware that other members of the public have used the area for purposes of access to the ice and waters of Pewaukee Lake.

Both witnesses, Brown and White,

testified that the surface of the area was a gravel-dirt mixture. Mr. Brown testified that prior to 1940 some surfacing had been applied to the area. He also indicated that the Village had installed a storm sewer on the site, although a date of installation could not be fixed. The location of this storm sewer is shown on the Plat of Survey (Exhibit 3) prepared by the witness, Hauser. Both witnesses, Brown and White, testified that the Village had never denied the use of this area for purposes of access to Pewaukee Lake.

Mr. Brown testified that the area had also been used by the Village for purposes of access of its emergency fire vehicles and police boat. This witness testified that as recently as October 14, 1976 and October 17, 1976 fire vehicles of the Village had used the area for purposes of access to the lake in obtaining water to assist in the fighting of fires. This area was also used for purposes of access to the lake waters for purposes of assisting in fighting the major fire at the high school on April 13, 1953. Mr. Brown

also testified that the Village had used the area for purposes of the dumping of snow but had also plowed and compacted the snow so as to continue to provide access to the waters and ice of Pewaukee Lake. He also testified that on occasion the Village had cleaned debris from the site.

Mr. David Klug, Village Engineer for the Village of Pewaukee, testified that the area in question is not paved and apparently has never been paved. The Village has, however, since February of 1970, applied crushed limestone to a width of approximately 20 feet over a portion of the area in question. With respect to two other areas of access in the general area in question, Mr. Klug testified that the Maple Street access consisted of a crushed limestone, dirt and grass mixture and that the Highland Avenue access had been paved to within 25 feet of the lake at the request of the adjoining land owners who had garages and driveways abutting on the access. Mr. Klug also testified that the Village had periodically cleared the area of debris and that he apparently had directed that debris left on the property by the

defendant or his employees be removed.

Mr. Klug also corroborated the testimony of Mr. Brown that the area had been used for emergency fire vehicle access and police boat access. He also confirmed Mr. Brown's testimony that the area had been plowed by the Village to the shoreline of Pewaukee Lake. Mr. Klug's testimony also confirmed that the public had used the area for purposes of access to the lake both during the winter and summer seasons.

Mr. Klug testified that when curb and gutter installation along Park Avenue (formerly Oakton Avenue) occurred in 1962 there was left a 30 foot opening at the mouth of the extension of Lake Street leading to the waters of Pewaukee Lake. He further testified that the Village had never denied access or closed off the area to the public.

The Village has posted signs on the area and across its entrance prohibiting parking and boat launching.

Here it is obvious that both the public and the Village utilize the disputed area of Lake Street for purposes of access to Pewaukee Lake during all

seasons. Limited improvements to the surface of the area by the application of occasional graveling was made by the Village. Curb and gutter installation along Park Avenue was interrupted at the mouth of the extension of Lake Street to the lake. In addition, occasional clearing of debris from the area was performed by the Village. The fact that the formal paving has not been accomplished is not a significant factor detracting from the Village's maintenance since at least one other access in the area (Maple Street) appears to be somewhat similarly surfaced. Furthermore, it is important to note that the area was dedicated to serve as an access to Pewaukee Lake rather than as a thru street. The nature and degree of maintenance required has apparently been commensurate with the use of the area by both the public and the municipality. The argument of the defendant that the Village has not improved the area to the level of an ordinary street does not render meaningless the use and maintenance that has occurred. Mr. Klug, the Village Engineer, testified that given the nature and degree of use by the Village and the

public, the improvements made by the Village have sufficed to accommodate such use. Mr. Brown further testified that the degree of the use on the part of the public has decreased somewhat in recent years as other areas of access have developed. The control and maintenance of streets of a municipality are uniquely within the authority of the governing unit. Simply because the area could have been improved to a greater degree does not require that the Court find that the dedication has lapsed or that acceptance has not occurred.

In Christianson v. Caldwell, 139 N.W. 751, 152 Wis. 135 it was held that though a highway was not legally laid out, the silent acquiesence of the abutting owners in the use of a strip of land for a highway for more than 50 years amounted to a dedication. Similarly, in Witter v. Damitz, 51 N.W. 575, 81 Wis. 385 where the owner of land assisted in laying out a road over his property and adjusted his fences with reference thereto followed by more than ten years of use as a highway with the knowledge and assent of such owner it was held that

the road became thereby a legal highway. And in Wyman v. State, 13 Wis. 742 and Lemon v. Hayden, 13 Wis. 177 it was held that continuous public use of land as a highway for 20 years with the consent and knowledge of the owner is conclusive proof and evidence of dedication.

Accordingly, the Court concludes that the disputed area in question was accepted both by the public authorities by virtue of the improvements made thereon and by virtue of the use by the public and the municipality for purposes of access to Pewaukee Lake. Thus, the implied or common law dedication is complete.

V
ACCEPTANCE AND REVERSION

The defendant contends that the Village has failed to accept, keep, use and maintain the area in question and accordingly a reversion under the language of the 1896 deed (Exhibit 7) has occurred.

Much of what the Court has held in Part IV of this decision governs the resolution of this final question.

The Court has already held that acceptance under the concept of implied or common law dedication has occurred both by virtue of the improvements made by the Village and the use on the part of the public and the Village. Such acceptance is adequate whether the dedication be an express one or an implied one (Gogolewski v. Gust, 16 Wis. 2d 510). It is important to note that the defendant's argument does not rest upon a claim of abandonment or non-user. Indeed, the record does not permit such a finding or such an argument. The question truely is one of whether the nature and degree of the improvements by the Village and the use by the public and the Village have been and are sufficient to constitute acceptance.

In this respect it is important to note that the reversionary cause of the 1896 deed (Exhibit 7) contemplated that the area in question be used as a "public street or highway approach to said lake and for no other purpose. . ." It is clear that the intent of all parties concerned was to create a means of access to Pewaukee Lake.

A short strip of land serving as access to a lake may require something different by way of maintenance and may carry something different by way of use than a street serving as a thoroughfare in the usual and customary meaning of that phrase. The maintenance of each must be consistent with the use of each. Here the Court finds that the limited maintenance by the Village has been sufficient to accommodate the use by the public and the Village. The dedication and the reversionary language must be examined within the context of the intent of the parties and the nature of the area in question and the use to which it is intended.

The Court has previously found that the Village has accepted the dedication and has maintained it consistent with the needs of the public and the municipality. The acceptance has been consistent with the spirit of the dedication and so also has the use. The Court further finds that such use and maintenance have continued to the present time and that no reversion under the language of the original 1896 deed (Ex-

hibit 7) has occurred to the defendant.

CONCLUSION

The Court therefore concludes that the area in question was and remains dedicated to the Village of Pewaukee by the defendant's predecessors in title and that the Village's claim to the disputed area of Lake Street is superior to that of the defendant's.

Counsel for the Village is directed to prepare conclusions and findings in the Circuit Court Case, No. 37178 consistent with this decision.

The County Court case, No. 76-958 is scheduled for further proceedings on the question of entry of judgment and consideration of penalty on January 12, 1977 at 8:30 a.m.

Dated this 27th day of December, 1976.

BY THE COURT:

/s/ Neal Nettesheim

TRANSCRIPT OF RECONVENED PROCEEDINGS
Dated February 22, 1977
(Formal Parts Omitted)

THE COURT: This is the matters of Village of Pewaukee versus Martin P. Heise and Martin P. Heise versus the Village of Pewaukee. The status of these cases at this point is that the Court has rendered its decision and judgment in these cases, although I do not believe the formal findings and judgment have been reduced to writing in this case.

MR. RATZEL: I just told Mr. Fabyan, Your Honor, that I would--he has sent them to me. They have been in my possession, I would say, at least two weeks or so. Pressure of other business prevented me from reviewing them, but I told him I would get them back at the earliest possible date.

THE COURT: Very well. The reason the Court calls this matter has nothing to do with the status of the judgment in this case. This is a most unusual proceeding that is prompted by virtue

of a telephone call from Mr. Heise to this Court of about perhaps two weeks ago. That telephone call and the comments related to the Court by Mr. Heise go directly to the integrity of the Court's decision in this case, and I advised Mr. Heise at the conclusion of that rather remarkable call that I did intend to reconvene these proceedings for the purpose of permitting Mr. Heise, if he wished, to make any further record of any type that he wished with respect to the remarks and statements that were made in that phone call.

Mr. Ratzel, I have no idea whether you have been enlightened as to the contents of that call or not, but I would presume that you have, and I would offer to the defendant and his counsel at this time the opportunity to complete and make any record they wish with respect to the content of that call. Mr. Ratzel or Mr. Heise?

MR. RATZEL: Well, first, Judge, let me say this: that, yes, I have been, if you want to call it, informed of some of the circumstances surrounding that particular call. The Court may or may not

know that at the time, or what I believed to be the time, of the making of the call I was in Florida, and I was informed of this matter after I had gotten back.

I do not know, nor did I make deep inquiry into the substances of the call, and I indicated to Mr. Heise that my role in this action would be determined by you might say the ordinary conduct of the ordinary kind of civil matter. That is, Mr. Heise has authorized me to take the necessary steps to appeal this matter, and I am in the process of doing so. As far as the matter that this Court has just put on the record, I don't believe I have any standing or position or feeling or argument in any respect. This is something evidently that Mr. Heise has done based upon his own feelings, and based upon his own realization of what he believes the facts to be. I do not intend to participate in it, and I can tell the Court that I am prepared to make no statements whatsoever.

THE COURT: Mr. Heise, is there any statement or record which you would wish to make with respect to the matter which

you discussed with me in that phone call? This is your opportunity.

MR. HEISE: Not at this time.

THE COURT: Well, I'll make this remark. Then I'll make the record because it is simply of such a serious and to the Court disturbing series of allegations that for me to sit back and for others to expect me to sit back and do nothing about this matter would be unthinkable.

The telephone call, and I'll recall it in as brief but I hope as accurate a fashion as possible, consisted of really three areas of complaint on the part of Mr. Heise.

Firstly, he indicated and suggested to the Court had he had received information that in some respect the decision rendered by the Court in this case had been either written by another or that the Court had received added information beyond the record in this case apparently in the form of amicus curiae information which, I believe, is the accurate phrase actually used by Mr. Heise in the telephone call, from other sources and other

lawyers, That statement is false.

Mr. Heise had also indicated to the Court that the decision in this case ran to the financial inurement and benefit of Mr. Michael Chapman, who was a witness in the case, and that since Mr. Chapman had been associated with a political campaign of this Court that therefore the decision and the integrity of the decision of the Court was suspect. I would only observe, firstly, that Mr. Chapman was Mr. Heise's witness, not the village's witness; that Mr. Chapman was a paid, and I might observe well paid, campaign advertising person in the campaign of this Court, and the suggestion and inference drawn by Mr. Heise under the circumstances of this case is totally without merit.

Mr. Heise further indicated that the Court had been on the premises on one or perhaps more occasions during the pendency of this action and apparently while preparing and rendering its decision, a statement which is equally false as the others.

I would ordinarily be inclined to attribute remarks of that kind on the

part of a party who was on the receiving end of an adverse decision as simply that, unhappy sentiments of one who is disappointed by the outcome of a lawsuit, and had it stopped there the Court could perhaps have let this matter rest were it not for an added observation on the part of Mr. Heise in the course of this conversation; that if in the light of those remarks this Court would not be inclined to perhaps reopen or apparently re-evaluate its decision.

Well, that is nothing short, in my judgment, Mr. Heise, of judicial blackmail, and I assure you this decision stands and will continue to stand unless reversed by appeal, which is your absolute right under the law, and Mr. Ratzel is apparently taking steps to see that that right is protected, but the fact that these allegations had been made; the fact that apparently the defendant, Mr. Heise, would presume that this Court would do nothing about them is a situation which this Court simply could not permit to endure, and even though the defendant has chosen not to make the record here today the Court feels compel-

in this respect to make that record.

Now, is there anything further, Mr. Ratzel?

MR. RATZEL: Nothing that I have, Your Honor.

THE COURT: Mr. Heise?

MR. HEISE: Nothing.

THE COURT: Mr. Fabyan?

MR. FABYAN: Nothing, Your Honor.

THE COURT: Very well. That's all.

Supreme Court

10. Municipal Corporations §651*—public land—encroachment—building placed on nonuser street.

Placing of buildings or other obstructions upon land of city constitutes obstruction and public nuisance which will not ripen into right unless city, by its conduct, shall become estopped from asserting its right.

11. Highways §163*—encroachment—construction on nonuser land—village's right to assert ownership.

Where plaintiff built concrete garage slab and patio rest on unused extension of street, village was not estopped from asserting its right to land since village had refused to sell land to plaintiff, and construction did not create valid interest in property.

APPEAL from a judgment of the County Court of Waukesha County, NEAL P. NETTESHEIM, Judge. *Affirmed.*

For the appellant there was a brief by *Larry Ratzel* of Elm Grove; a reply brief by Martin Heise, pro se, and oral argument by *Daniel Fay* of Pewaukee, and Martin Heise, pro se.

For the respondent there was a brief by *August E. Fabyan, Jr.*, and oral argument by *Timothy Garrity*, both of Hartland.

COFFEY, J. This is an appeal from a judgment of the County Court of Waukesha County, entered on April 20, 1977, adjudging that certain real estate was dedicated to the Village of Pewaukee by the appellant's predecessor in title.[1]

The central issue in this case is the ownership of a strip of land in the Village of Pewaukee on Pewaukee Lake, immediately adjacent to a lot owned by the ap-

* See Callaghan's Wisconsin Digest, same topic and section number.

[1] Dedication is the appropriation of land to some public use, made either expressly or impliedly by the owner and accepted for such use by or on behalf of the public. Dedication may be common law or statutory. Black's Law Dictionary 500 (4th ed. rev. 1968).

pellant, Martin Heise. Both Mr. Heise and the Village of Pewaukee claim title to the strip of land.

On August 3, 1887, when the plat of land known as the Lakeview Addition (Diagram 1) was recorded in the Waukesha County register of deeds' office, neither the strip of land which is the subject of this dispute nor the lot owned by the appellant existed. The 1887 plat shows the intersection of what was then Oakton Avenue (now known as Park Avenue) and Lake Street terminated at the meander line[2] or boundary of Lake Pewaukee. On the plat Oakton Avenue runs parallel to the lake boundary with at 16-foot strip of dry land separating Oakton Avenue from Lake Pewaukee.

On October 14, 1896 Walter C. Clark, his wife, May, Ola M. Anderson and Helen N. Richmond executed a warranty deed to the Village of Pewaukee that purported to convey land extending beyond the termination point of Lake Street into the waters of Pewaukee Lake as shown by the plat of Lakeview Addition. No one knows when the land formed but apparently this area of land conveyed in the deed was created out of Pewaukee Lake sometime between the date of the initial plat of the Lakeview Addition, 1887, and the date of the deed, 1896. It cannot be determined from the evidence adduced at trial whether this newly created land was formed by accretion,[3] reliction[4] or some process of reclamation.[5]

The full extent of this newly created land, along the shoreline of Pewaukee Lake, is shown by the plat of

[2] Meander line is the boundary or border line of a body of water. Black's Law Dictionary 1132 (rev. 4th ed. 1968).

[3] Accretion is the process whereby land is created through the gradual depositing of soil by operation of natural causes. *Id.* at 36.

[4] Reliction is the process whereby land is created by the permanent receding or withdrawal of water in a lake or river. *Id.* at 1455.

[5] Reclamation is the process whereby land is created by the operation of artificial means.

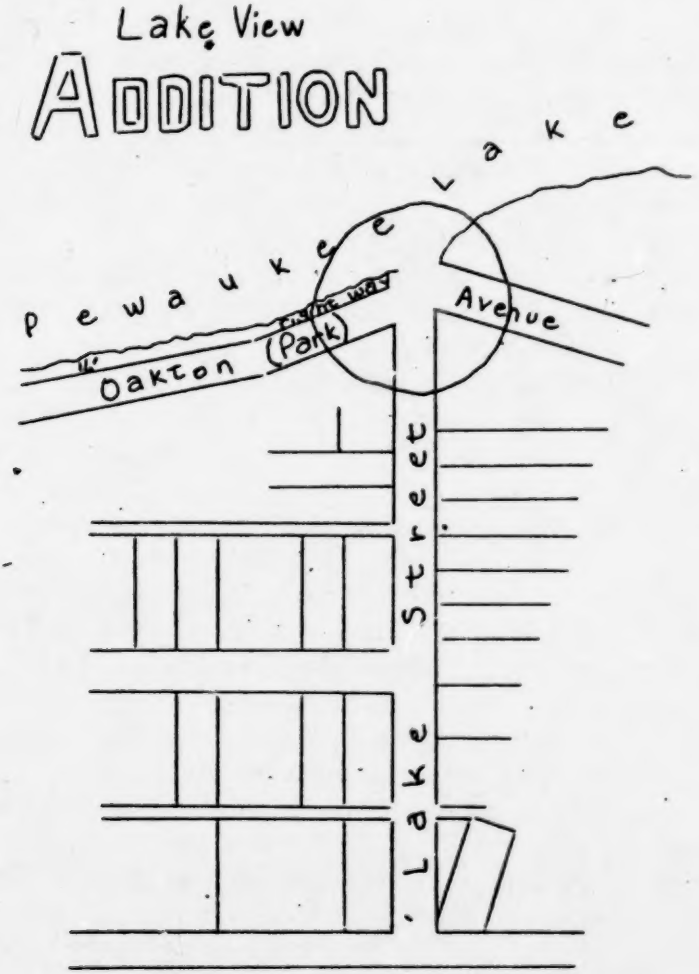

Lake View
ADDITION
Lake
Pewaukee
Oakton
(Park)
Parking way
Avenue
Street
Lake

DIAGRAM 1

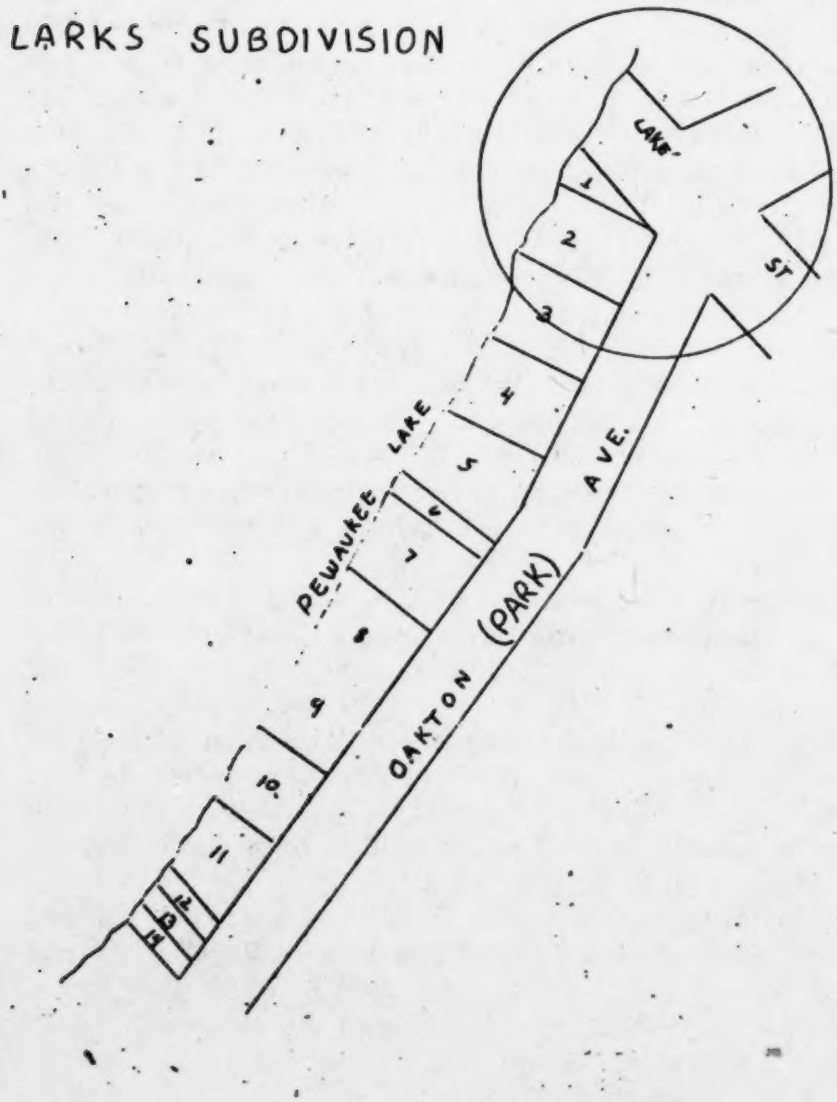
Clark's Subdivision (Diagram 2), duly recorded on August 1, 1908. The Clark's Subdivision plat establishes that the amount of dry land between Oakton Avenue and Pewaukee Lake had increased from 16 feet to a width of from 50 to 72 feet. Subsequently, after the addition to the land through accretion, reliction or reclamation, fourteen new lakeshore lots were carved out of this recently formed land with Lot 1 located immediately adjacent to the strip of land shown on the Clark Subdivision plat as an extension of the original Lake Street. This extension of Lake Street is the same land conveyed to the Village of Pewaukee by the 1896 warranty deed from Walter and May Clark, his wife, Ola M. Anderson and Helen Richmond and is the subject matter of the present dispute.

In November of 1975 the appellant, Martin Heise, purchased Lots 1 and 2 in the newly formed land between Oakton Avenue and Pewaukee Lake, as shown in the plat of Clark's Subdivision. The property was conveyed to the appellant and his wife, Anna Heise, by deed from the Pewaukee Building Panel Corporation, a corporation primarily owned by the appellant and members of his family.

Shortly after purchase of Lots 1 and 2, the appellant sought to obtain title to the land adjacent to Lot 1, the land shown as an extension of Lake Street on the Clark Subdivision plat, in order to construct a garage on it. When the appellant inquired as to ownership of the land he was told that the Village of Pewaukee owned the land as a continuation of Lake Street. Appellant asked the village to either sell him the land or to vacate it, but the village declined to sell or vacate.

Following the village's refusal to vacate or sell the land to Heise, appellant investigated the village's title and discovered the 1896 warranty deed in which the Clarks, Anderson and Richmond conveyed the subject property to the village and found that the 1896 deed contained the following reversionary clause:

DIAGRAM 2


LARKS SUBDIVISION
LAKE
1
2
3
4
5
6
7
8
9
10
11
12
13
14
PEWAUKEE
OAKTON (PARK) AVE.
ST

"Said piece to be accepted, kept, used and maintained by said grantee as and for a public street or highway approach to said lake and for no other purpose, and in case of the discontinuance of such use and maintenance, said piece shall revert to said grantors, their heirs or assigns."

Upon discovery of the deed and its reversionary clause the appellant obtained a quit claim deed (dated April 15, 1976) from Helen R. Jerome, the sole heir to the grantors named in the 1896 deed, conveying the disputed property to him. Shortly thereafter, in spite of the village's refusal to vacate or sell the property, the appellant commenced construction of a concrete slab for a garage and patio, which structures encroach onto and over the disputed land.

On May 5, 1976 the appellant erected a rope across the entrance to the Lake Street extension with a sign indicating it was private property. The police issued a citation to the appellant for obstructing a public street in violation of Ordinance 10.07(11) of the Municipal Code of the Village of Pewaukee. Appellant contested the citation and the matter was set for trial in the County Court for Waukesha County.

On July 22, 1976 the appellant commenced an action to quiet title to the property. The quiet title action and the action contesting the citation were consolidated by stipulation of the parties entered on September 3, 1976. The trial on the action to quiet title was held in the County Court for Waukesha County and the ordinance violation was held open pending this appeal.

At the trial the appellant testified that the disputed property was for the most part vacant. He stated that the property consisted of an area of grass, dirt and gravel with a twenty foot driveway approach to Lake Street. In support of his argument for abandonment of the property by the village, appellant testified that when he originally moved into Lots 1 and 2 the disputed prop-

erty was covered with debris which he hauled away and further that during the winter months the village of Pewaukee frequently dumped snow on the property.

Gerald Kramer, a mason and cement contractor who was regularly employed by the appellant and helped in the construction of the appellant's house, garage slab and patio, was called to testify on the appellant's behalf. He stated in further support of the appellant's abandonment theory that when he first saw the disputed property it was covered with garbage and debris, but that there was a lane over the property, 30 to 40 feet in width and approximately 100 feet long, which was covered with a combination of sod and gravel.

William E. Brown, a resident of the area, testified that since 1927 the Village of Pewaukee has maintained some kind of a lane or roadway over the property down to the lake front. Furthermore, he testified that the Lake Street extension provided a normal access for vehicular traffic onto and off of the ice in the wintertime while in summer the land was used as a regular access to the lake for boat launchings. He stated that although the village had erected signs on the property designating the area as a fire lane and forbidding parking or boat launchings, the area residents disregarded the warning signs pursuant to an understanding with the village and regularly launched their boats from the property. Lastly, Mr. Brown testified that people fished the Pewaukee Lake from the property almost daily and occasionally used it for swimming.

Another resident of the area, Charles F. White, testified that he personally had used the Lake Street extension as an access road to the lake on a regular basis from 1950 until 1973 when he transferred his boat mooring to another part of the lake. He also testified that the property was generally kept free from trash except for a time when there was debris from a burned out house which originally stood on the appellant's lot.

David L. Klug, an administrative engineer for the Village of Pewaukee, testified that the Lake Street extension had been open to the public for as long as he knew. He stated that occasionally village work crews cleaned up the area and that as recently as 1970 the village laid crushed limestone on the lane to a width of about 20 feet. He stated that also in the past the village fire and police departments had used the Lake Street extension for emergency access to the lake.

On the basis of the evidence, the trial court found the property in question had been effectively dedicated to the Village of Pewaukee by the appellant's predecessors in title and the village's continued maintenance and use of the property was sufficient to prevent any reversion.

On appeal the appellant contends that the disputed portion of Lake Street was never effectively dedicated to the Village of Pewaukee, or in the alternative, if the dedication is found valid, that all or at least part of the disputed property has reverted back to him as a result of the village's abandonment or failure to maintain the land as a street or highway. Lastly, appellant contends if this court rules the dedication to be valid and that no reversion occurred, he is, nevertheless, entitled to the land upon which his garage slab and patio encroach because there is no interference with the public's right-of-way.

ISSUES

1. Did the trial court err in finding that the Village of Pewaukee held title to the disputed portion of the Lake Street extension?

2. Has the property in question been maintained as a highway or street such that title has not reverted back to the original owners?

In this case it is undisputed by the parties that the recording of the plat of Lakeview Addition in the Waukesha County Register of Deeds' office constituted a statu-

tory dedication to the Village of Pewaukee of the original Lake Street then and there existing as of 1877. The reason that a conflict over ownership exists in this case is because at the time the Lakeview Addition plat was recorded that portion of Lake Street which is in dispute here was either undiscovered land submerged under the waters of Pewaukee Lake or it did not exist. Because the property did not exist at the time of the recording of the Lakeview Addition plat it was impossible for it to be reflected in the deed of dedication of the disputed area to the Village of Pewaukee. It is interesting to note that the 1887 dedication of the 16 feet of Lake Street down to the original shoreline of Pewaukee Lake gave the village all the land that then existed.

[1, 2]

However, since the village owned the land known as Lake Street down to the old waterline by virtue of the 1887 dedication, the question arises as to whether the village, by virtue of its title to the original land, was also entitled to the newly created land between Lake Street's original termination point and the new waterline. It is well established that an owner of land abutting on the waters of a river or lake possesses certain riparian or littoral rights.[6] Riparian rights include:

". . . the right to access to the water; the right to extract and use the water, to a certain extent; the right to have the stream flow in its natural course and volume or to have the body of water remain in its natural condition; and the right to additions to the land by accretions and relictions." 78 Am. Jur.2d, *Waters*, §265, p. 710.

This court, as early as 1877, held that riparian rights include ". . . the right of the riparian owner to accretions formed by slow and imperceptible degrees upon or

[6] Riparian or littoral rights refer to the rights of one owning land on the banks of a river, lake or sea to have access to and use of the shore and water.

against his land, and to those portions of the bed of the lake or pond adjoining his land uncovered in the same manner by the dereliction of the water therefrom." *Boorman v. Sunnuchs,* 42 Wis. 233, 242 (1877). The riparian owner's right to such newly created lands is absolute as against all the world excepting the public's rights of navigation. *Doemel v. Jantz,* 180 Wis. 225, 193 N.W. 393 (1923).

[3]

Riparian rights are not limited to private owners. This court has held that if a public street or highway exists so that its boundary line and the waters of a navigable lake or river meet, the riparian rights incident to the land composing the street belong to the public. *Village of Pewaukee v. Savoy,* 103 Wis. 271, 79 N.W. 436 (1899); *Lawler v. Brennan,* 150 Wis. 115, 134 N.W. 154 (1912); *Jansky v. Two Rivers,* 227 Wis. 228, 278 N.W. 527 (1938).

The case of *Jansky v. Two Rivers, supra,* is especially noteworthy as the facts in that case are almost identical to those in the present case. In *Jansky,* as in this case, a city street originally extended to the shoreline of a lake. Subsequent to the recording of the plat of the city the lake shoreline receded and approximately 425 feet of new land was added. One of the owners of land originally abutting on the lake brought a quiet title action to determine the extent of his land as a result of the lake receding. In that case the court cited *Village of Pewaukee v. Savoy, supra,* and held that part of the newly added land ". . . must be apportioned to the City of Two Rivers by reason of riparian rights attaching in favor of a municipality to accretions or reliction along a public highway." *Jansky v. Two Rivers, supra* at 241.

In the present case, it could not be determined whether the newly added land was the result of a natural process such as accretion or reliction, or whether it was the re-

sult of an artificial process such as reclamation. However, on the basis of the relatively short period of time over which the new land appeared (only nine years), the trial court reasoned that it could not have been the result of a natural process, which generally operates in a gradual manner and takes many more years but was probably the result of the artificial process of reclamation. While recognizing the rule that riparian owners are entitled to additions to their land caused by accretions and relictions, the trial court was uncertain whether this same rule would apply to new lands formed by reclamation. Recently, this court in *De Simone v. Kramer*, 77 Wis.2d 188, 252 N.W.2d 653 (1977) held that:

". . . appears to be the prevailing doctrine that the causing or hastening of gradual deposits by artificial constructions, made by persons other than the benefited and claiming owner, does not prevent the doctrine of accretions from applying. 7 *Powell on Real Property, supra*, §983, p. 614." *Id.* at 199.

In that case land was artificially extended as a result of a government dredging operation in a navigable channel. The artifically formed land inured to the benefit of the owners of the abutting land.

[4]

In view of the holdings in *Jansky v. Two Rivers, supra*, and *De Simone v. Kramer, supra*, we hold that regardless of whether the land in the Lake Street extension was formed as a result of natural or artificial processes, the Village of Pewaukee has title to the land by virtue of its ownership of Lake Street up to the original shoreline.

Reversion

The appellant further contended that the ownership of the property in question reverted back to him, as successors to the original grantors, as the village failed to use or maintain the land as a highway or street access to the lake. Appellant claims the right of reversion ex-

ists in this case under the provisions of the 1896 deed conveying the land to the village and under sec. 80.32, Stats.[7] This statutory right of reversion is a codification of the common law right of reversion that existed in Wisconsin at that time:

"It is undisputed that the owner of land abutting a public highway holds title to the center of the highway subject to the public easement. *Walker v. Green Lake County,* 269 Wis. 103, 111, 69 N.W.2d 252 (1955); *Spence v. Frantz,* 195 Wis. 69, 70, 217 N.W. 700 (1928); *Hustisford v. Knuth,* 190 Wis. 495, 496, 209 N.W. 687 (1926); *Mueller v. Schier,* 189 Wis. 70, 81, 205 N.W. 912 (1926); *Gardiner v. Tisdale,* 2 Wis. 115 (*153) (1853). When the highway is discontinued or vacated the land reverts to the owner unencumbered by the easement. *Id. This reversionary interest exists independently of sec. 66.296, Stats. As the cases above cited indicate, this right existed at common law.* The right has been codified in sec. 80.32(3) . . ." (emphasis supplied.) *Miller v. City of Wauwatosa,* 87 Wis.2d 676, 680, 275 N.W.2d 876 (1979).

Since we hold that the 1896 deed adds nothing to the appellant's existing claim to the land, because the village already owned the entire parcel of the land then in existence allegedly conveyed by the deed, there is no reason for us to consider the issue of whether a reversion occurred under that instrument. However, there remains the question of whether a reversion occurred under common law or under sec. 80.32(3), Stats.

[7] "80.32 Discontinuance of highways; reversion of title. (1) . . .

"(2) . . .

"(3) When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained; if not it shall be equally divided between the owners of the lands one each side thereof."

The appellant contends that the village failed to use the property in question as a street or highway within the common understanding and definition of these terms and, therefore, he is entitled to the land. As support for this contention the appellant cites *Town of Polk v. Gilbert*, 258 Wis. 150, 45 N.W.2d 88 (1950), in which the court rejected a town's claim that it had acquired a highway over a piece of lakeshore property on the ground that the land claimed was of such a character that it could not be used for highway purposes because ". . . the contour of the ground was such as to make automobile travel impossible." *Id.* at 152. The court agreed with the trial court's finding that the land was incapable of serving as a highway because it could not be used for purposes of traveling anywhere the public might be interested in going.

Town of Polk is clearly distinguishable from the present case because there the town's claim to the property was by prescription[8] while here the village's claim to the land is based on a dedication. The test used to determine whether a local government has acquired the property of another by adverse possession is clearly not the same test as that used to determine whether a party has acquired government property by virtue of the government's abandonment of the same. In addition, the condition of the land in *Town of Polk* was such that the use of the land for vehicular traffic was almost impossible and, therefore, never attempted. In the case before the court a part of the land was suitable for vehicular traffic and in fact was used for vehicular travel.

[5]

Although not as well-traveled as other streets, the Lake Street extension was used as a roadway to the lake

[8] Prescription refers to the acquiring of title to property by long-continued use and enjoyment. Black's Law Dictionary 1346 (4th ed. rev. 1968).

for summer and winter sporting activities, fishing, boating, ice skating, etc. It is obvious that streets terminating at the edge of a body of water are not subject to the same degree of vehicular travel as other through streets. This fact, however, does not destroy their classification as a street or highway.

Faced with a similar problem in *Walker v. Green Lake County,* 269 Wis. 103, 69 N.W.2d 252 (1955), this court stated:

"The plaintiffs contend that the extension as to the highway is not a highway but is merely an area for parking cars and for recreational purposes. They contend that highways are limited to roads for the free and unobstructed passage of vehicles in each direction. It is true that the original definitions of highways were limited to lands used for the purpose of direct travel. However, the term 'highway' may be used in a broader sense. The conception of highways is changing and it is now felt that highways established for the general benefit must admit of new methods of use whenever it is found that the general benefit requires it. For the courts to limit the use of highways without considering new methods and usage would defeat, to some extent at least, the purpose for which highways are established." *Id.* at 112.

Perhaps with this thought in mind the legislature included a very broad definition of the term highway in the chapter of the Wisconsin statutes on statutory construction. Sec. 990.01(12), Stats., provides as follows: "'Highway' includes all public ways and thoroughfares and all bridges upon the same." This construction of the term *highway* applies unless it would "produce a result inconsistent with the manifest intent of the legislature." In light of such a broad definition, it is clear that the Lake Street extension has served as a highway.

Appellant next contends that, even if the use is shown to be that of a highway or a street, the village has abandoned or discontinued this use of the land within the

meaning of sec. 80.32(2), Stats., and that, therefore, he is entitled to the property by virtue of sub. (3) to that section. Sec. 80.32(2), Stats., provides:

"(2) Every highway shall cease to be a public highway at the expiration of 4 years from the time it was laid out, except such parts thereof as shall have been opened, traveled or worked within such time, and any highway which shall have been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued."

[6]

Explaining this section in *State ex rel. Young v. Maresch*, 225 Wis. 225, 232, 273 N.W. 225 (1937), the court stated that "[a]bandonment of a highway by virtue of that statute can occur only when it has been 'entirely abandoned as a route of travel,' *and* when 'no highway funds have been expended [upon it] for five years." (Emphasis supplied.) In effect, both conditions must be met.

[7]

In the case at bar the evidence presented at trial clearly shows that the entire 60 feet of the Lake Street extension was never abandoned as a route of travel. At trial the testimony of the two area residents was to the effect that it had always been used by the public for purposes of access to the lake on a regular basis since 1927. In light of the fact that the Lake Street extension has been used as a route of travel, the question of whether the village had expended money on that portion of the street within the past 5 years is irrelevant. Before the court could rule that the village has discontinued its use of the property as a highway it is incumbent upon the appellant to demonstrate total abandonment on the part of the village and the lack of any public expenditures on the highway within the past 5 years.

However, the first part of sec. 80.32(3), Stats., may be applicable in this case. Subsec. (3) provides that portions of a highway which have not been opened, traveled or worked within four years of the time it was laid out shall be deemed discontinued. Although the Lake Street extension is platted as 60 feet wide, only about 20 feet of this width has actually been worked. Thus, it would appear that at least a part of the land could conceivably revert to the appellant.

The village contends that sec. 80.32, Stats., does not apply to village or platted roads but only to town roads. As support for this contention the village cites to the fact that sub. (1) of sec. 80.32, Stats., expressly refers only to towns. However, it should be pointed out that subs. (2) and (3) of this statute, under which the reversion would have occurred, do not refer to any specific unit of government, but refer only to highways in general and using the broad definition of highway contained in sec. 990.01, Stats., and, therefore, would be clearly applicable here.

Moreover, in *Miller v. City of Wauwatosa*, 87 Wis.2d 676, 681, 275 N.W.2d 876 (1979), this court stated in the context of this statute (sec. 80.32, Stats.) that a city street is a public highway and that when a municipality alters a street such that a portion of the former street is not included within the new street, there is a discontinuance of that portion of the old street no longer being used. Thus, on the basis of that case it would appear that appellant is entitled to that portion of the disputed property that has not been opened, traveled or worked.

[8]

However, in *Paine Lumber Co. v. City of Oshkosh*, 89 Wis. 449, 61 N.W. 1108 (1895), this court held that the statutory predecessors to sec. 80.32(2), Stats., did not apply to "streets dedicated or granted by recorded plat, operating as a statutory conveyance. Such streets are

not highways within their purview and meaning." *Id.* at 457. In *Paine Lumber Co., supra,* the court relied heavily on the earlier case of *Reilly v. City of Racine,* 51 Wis. 526, 8 N.W. 417 (1881), wherein the court held that: "Until the time arrives when any street or part of a street is required for actual public use, no mere *non-user,* of any length of time, will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public." *Id.* at 529–30. The reason for this rule was that cities and villages must have a ". . . chance of growth commensurate with the public necessity, which will not be lost by mere lapse of time. . . ." *Id.* at 530. *See also: Klinkert v. City of Racine,* 177 Wis. 200, 188 N.W. 72 (1922).

More recently in *Jefferson v. Eiffler,* 16 Wis.2d 123, 113 N.W.2d 834 (1962), this court reaffirmed the *Reilly* holding that nonuse of a street or alley, or part of a street or alley, will not work as an abandonment until such time as the street, alley or portion thereof is required for actual public use, but is not in fact used. The court also stated that even after such time as public use requires the opening of a particular street or alley, no abandonment will be found absent a manifest abuse of discretion by the public authority in charge.

Although *Miller v. City of Wauwatosa* appears to contradict these earlier cases, it can be distinguished. The earlier cases all involved streets or alleys which had not yet been opened or had been only partially opened to public travel. Although laid out in the original plats of the cities for future use, the need to open them had not yet arisen. To hold that under such circumstances land set aside for future streets is abandoned and reverts to the abutting owners would clearly thwart the long-range planning and development efforts of local governments. In *Miller,* on the other hand, the alleged abandonment

occurred with respect to a portion of land which, having been opened and used as a street, was later abandoned as a result of alterations made in the width and location of the street to accommodate area growth. It cannot be said that the portion of street discontinued in *Miller* would be needed for future growth and development, for it was just such growth and development which caused the abandonment of that land in the first place.

[9]

In the case presently before the court while the full width of the Lake Street extension has not been totally paved and opened for vehicular traffic, nevertheless the unpaved portion of the land allows for the municipality's possible future use and expansion. Thus, the *Reilly* rationale applies and no abandonment has occurred.

Lastly, appellant argues that even if this court should find that a valid dedication did occur and that the village did not abandon or discontinue the street, he should nevertheless be allowed to retain that portion of the land upon which the concrete slab and patio rest since they do not interfere with the public's use of the land. This contention, however, is unsupported in law. As sec. 86.04(1), Stats., provides:

"Highway encroachments. ORDER FOR REMOVAL. If any highway right of way shall be encroached upon, under or over by any fence, stand, building or any other structure or object, and including encroachments caused by acquisition by the public of new or increased widths of highway right of way, the department of transportation (in case of a state trunk highway), the county highway committee (in case of a county trunk highway), or the city council, village or town board (in case of a street or highway maintained by or under the authority of any city, village or town) may order the occupant or owner of the land through or by which such highway runs, and to which the encroachment shall be appurtenant, to remove the same beyond the limits of such highway within 30 days. The order shall specify the extent and location

of the encroachment with reasonable certainty, and shall be served upon such occupant or owner."

[10]

In *Klinkert v. Racine*, 177 Wis. 200, 188 N.W. 72 (1922), this court held that "The placing of buildings or other obstructions upon an alley of the city constitutes an obstruction and a public nuisance. This wrong on the part of the obstructor will not ripen into a right unless the city by its conduct shall become estopped from asserting its right." *Id.* at 204.

[11]

Here, there is no evidence of any conduct on the part of the village that would estop it from asserting its rights. In fact the village made its position clear to the appellant before any construction or building had taken place, by denying his petition to vacate and refusing to sell the land. Even though the appellant took a calculated risk and expended funds in the building and construction of a concrete slab and patio, we know of no decision in this court supporting his contention of a valid interest in the disputed property. Therefore, we hold that the title to the Lake Street extension remains with the Village of Pewaukee and does not revert to the original owners and/or their successors in title.

By the Court.—Judgment affirmed.

79-1830

Supreme Court, U. S.
FILED
OCT 9 1980
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No._____

MARTIN HEISE,

Petitioner,

v.

VILLAGE OF PEWAUKEE,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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October 21, 1980

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ARGUMENT

THE UNITED STATES SUPREME COURT LACKS JURISDICTION BECAUSE THE CONSTITUTIONAL ISSUE WAS NOT RAISED IN THE STATE COURTS.

The United States Supreme Court lacks jurisdiction to issue a writ of certiorari because the constitutional issue advanced in support of the petition for the writ was not raised in the Wisconsin courts.

This court has held that it will not review constitutional issues by certiorari to a State Supreme Court unless those issues were sufficiently and properly presented in the State courts. In Street v. New York, 394 U.S. 576; 581-585 89 S.Ct. 1354, 22 L.Ed. 2nd 572 (1969), the court held:

> "Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§ 1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, e.g. Bailey v. Anderson, supra; Chicago, I.&L.R. Co. v. McGuire, 196 U.S. 128, 131-133 (1905).

> The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." At pp. 581 - 582.

Contrary to petitioner's assertion, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2nd 297 (1973) does not support issuance of a writ of certiorari in the instant case. In Chambers v. Mississippi (supra) this court did not change the jurisdictional requirements enunciated in Street v. New York (supra) for the issuance of a writ of certiorari to a State Supreme Court. On the contrary the court in Chambers stated:

> "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."
>
> Chambers v. Mississippi (supra) at p. 303

That this court in Chambers did not alter its previously enunciated jurisdictional requirements for issuance of a writ of certiorari to a State Supreme Court is emphasized by the concurring opinion of Mr. Justice White. Mr. Justice White, restating the rationale of the dissent of Mr. Justice Rehnquist, while disagreeing with the conclusion of the dissenting opinion, wrote:

> "We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother Rehnquist points out, the Court stated in Street v. New York, 394 U.S. 576, 582 (1969), that 'when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the

> aggrieved party in this Court can affirmatively show the contrary.'
>
> Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses."
>
> Chambers v. Mississippi (supra) at p. 303.

Additionally, the facts in Chambers are so dissimilar from the facts in the instant case that Chambers is barely relevant and certainly not controlling with regard to the question of whether or not this court should issue the writ in the case at bar. In the Chambers decision this court stated with regard to petitioner, Chambers:

> "In large measure, he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence. Chambers asserts in this Court, as he did unsuccessfully

in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law.[3] It is necessary, therefore, to examine carefully the rulings made during the trial."

---

[3]On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us. He objected during the trial to each of the court's rulings. As to the confrontation claim, petitioner asserted, both before and during trial, his right to treat McDonald as an adverse witness. His motion for new trial, filed after the jury's verdict, listed as error the trial court's refusal to permit cross-examination of McDonald and the exclusion of evidence corroborative of McDonald's guilt. The motion concluded that the trial "was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution." Chambers reasserted those claims on appeal to the State Supreme Court. After the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressed almost entirely to the

> claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted, and no claim has been made by the State - in its response to the petition for certiorari, in its brief on the merits, or at oral argument - that the questions are not properly reviewable by this Court. See Street v. New York, 394 U.S. 576, 581-585 (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-68 (1928).
>
> Chambers v. Mississippi (supra) at p. 289 & 290

The petitioner herein, unlike the petitioner, Chambers, and unlike the petitioner in Street v. New York (supra), failed to raise the constitutional issue in either the trial court or the State appellate court.

Wisconsin law requires that objections and claims of error must be raised during the trial.

Wis. Stats. Sec. 805.11 provides as follows:

> 805.11 Objections, exceptions. (1) Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made.
>
> (2) A party raising an objection must specify the grounds on which the party predicates the objection or claim of error.
>
> (3) Exceptions shall never be made.
>
> (4) Evidentiary objections are governed by s.901.03.

Petitioner failed to raise the due process issue presented herein during the trial.

Notwithstanding the provisions of Wis. Stats. Sec. 805.11, and petitioner's failure to raise the due process issue during the trial, petitioner had numerous other opportunities to raise the constitutional issue before the trial court and either specifically declined to do so or neglected to do so.

After the trial, the trial court summoned the parties for the specific purpose of allowing petitioner to make a record regarding the matters alleged herein as being violations of petitioner's right to due process. (Appellant's App. P. A-31 - A-34). Both petitioner and his counsel specifically refused to raise on the record the issue of due process at that time despite having been given the opportunity to do so.

The petitioner could also have raised the issue in a motion for a new trial. Wisconsin law provides that a party may move the court for a new trial and specifies the grounds upon which the motion may be granted.

> 805.15 New Trials. (1) Motion. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the in-

terest of justice. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

805.15(3) Newly-discovered evidence. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(a) The evidence has come to the moving party's notice after trial; and

(b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and

(c) The evidence is material and not cumulative; and

(d) The new evidence would probably change the result.

Additionally, Wisconsin law provides:

805.17 Trial to the Court. (1) Motion at Close of Plaintiff's Evidence. After the plaintiff, in an action tried by the court with-

out a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

(2) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall file its findings and conclusions prior to rendering judgment. In granting or refusing interlocutory injunctions the court shall similarly file its written findings of fact and conclusions of law which

constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

(3) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial.

> (4) Appeal. In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for new trial.

The Waukesha County Circuit Court judgment roll in Case #37179, Martin Heise v. Village of Pewaukee, indicates that no motion for a new trial was filed by petitioner.

Additionally, Wis. Stats. Sec. 806.07 provided petitioner with the opportunity to raise the matters alleged herein as the basis for issuance of the writ of certiorari by a motion to be relieved from the judgment.

> 806.07 Relief from Judgment Order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s.805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s.805.16. A motion under this section does not affect the finality of

> a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

The aforementioned judgment roll in the instant case indicates that no motion to be relieved from the judgment was filed by petitioner.

Petitioner also failed to raise in his appeal to the Wisconsin Supreme Court the issues presented herein as the basis for issuance of a writ of certiorari.

Petitioner identified and presented the following six issues to the Wisconsin Supreme Court in his appellate brief:

> 1. The disputed portion of Lake Street, originally deeded to plaintiff-respondent to be used only as a public street or highway approach to Pewaukee Lake, reverted to defendant-appellant upon the plaintiff-respondent's discontinuance of such use;

2. The defendant-appellant is entitled to the full and unencumbered ownership in fee of the subject property as neither the Village nor the public has accepted the prior dedication;

3. Alternatively, defendant-appellant is entitled to such portion of the subject property as has been abandoned by the Village and the public;

4. Under the provisions of Section 80.32 of the Wisconsin Statutes, defendant-appellant is entitled to the disputed property by virtue of the abandonment of it by the Village and the fact that no highway tax has been expended for it during the past five years;

5. If the court should deny defendant-appellant's arguments as set forth in 1 through 4, inclusive above, defendant-appellant is nevertheless entitled to use so much of the land as does not interfere with the public's right; and

6. A primary question before the trial court was whether the disputed land was part of a recorded plat.

Index to Appellant's Brief filed 5/19/80, Wisconsin Supreme Court Case #79-1830; Martin Heise v. Village of Pewaukee, 92 Wis. 2d 333.

Petitioner identified and presented the following four additional issues to the Wisconsin Supreme Court in his reply brief:

1. No interest was ever created in Lake Street in favor of the respondent by virtue of the plat of Lakeview Addition in 1887;

2. The court's consideration of the plat of Clark's subdivision and its subsequent finding of a common law dedication is irrelevant since a dedication had already occurred by virtue of the 1896 deed;

3. The trial court errored in its finding that Lake Street had been maintained by the respondent and that, therefore, there was no reversion; and

4. While the plat of Clark's subdivision cannot serve as a dedication of the area in ques-

> tion to the respondent, it does further evidence an intent on the part of the respondent to discontinue the allowed use set forth in the 1896 deed and to abandon the area in question.
>
> Index to Appellant's Brief filed 1/23/78, Wisconsin Supreme Court Case #76-749, Martin Heise v. Village of Pewaukee, (supra).

Thus none of the issues which petitioner identified and presented on appeal to the Wisconsin Supreme Court raised or dealt with the question of due process. Only at the conclusion of the reply brief did petitioner make a vague and passing reference to the subject matter which he now alleges should serve as adequate basis for the issuance of a writ of certiorari.

PETITIONER PRESENTED THE ISSUES HEREIN TO THE WISCONSIN SUPREME COURT IN A LEGAL PROCEEDING WHICH WAS SEPARATE AND DISTINCT FROM THE CASE AT BAR.

On February 1, 1977, petitioner filed a complaint with the Wisconsin Judicial

Commission alleging that Judge Neal Nettesheim had engaged in judicial misconduct while conducting the trial in the case which is the subject of this petition. The essence of petitioner's complaint was that Judge Nettesheim had violated the Wisconsin Code of Judicial Ethics (Appellant's App. P.4) in that he was not impartial and had failed to disqualify himself, and in that he had permitted ex parte communications to influence his decision. An investigation was conducted by the Commission.

On March 30, 1977, petitioner filed a petition for writ of certiorari to the Wisconsin Judicial Commission with the Wisconsin Supreme Court. The parties filed briefs in May of 1977.

On July 1, 1977, the Wisconsin Supreme Court deferred action on the petition until after disposition of the appeal in Martin Heise v. Village of Pewaukee, 92 Wis. 2d 333. On July 22, 1977, the Court denied a Motion for Reconsideration of that decision.

On December 21, 1979, the Court denied Mr. Heise's Motion for Production of Documents. On March 11, 1980, the Court denied Mr. Heise's aforementioned Petition for Writ of Certiorari to the Wisconsin Judicial Commission.

The Judicial Commission received no other complaint from petitioner against Judge Nettesheim and closed its file on the matter following the Court's decision on March 11, 1980.

CONCLUSION

The issues presented as the basis for this petition for issuance of a writ of certiorari to the Wisconsin Supreme Court were never raised in the Wisconsin courts as a part of the case entitled Martin Heise v. Village of Pewaukee (supra). Petitioner elected to raise the due process issue through the Wisconsin Judicial Commission in a legal proceeding which is not before this court. The petition for writ of certiorari should be denied as the

United States Supreme Court lacks jurisdiction to issue the writ.

Respectfully Submitted,
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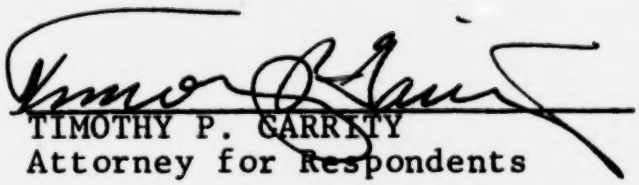
October 21, 1980

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 1980, three copies of the response to petition for writ of certiorari were mailed, postage paid, to Mr. William H. Lynch, Attorney at Law, 161 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, counsel for the petitioner. I further certify that all parties required to be

served have been served.



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